Filed 4/19/10 In re Esmeralda M. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ESMERALDA M. et al., Persons Coming Under the Juvenile Court Law.	B215921 (Los Angeles County Super. Ct. No. CK75939)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.M., Defendant and Appellant.	

APPEAL from an order of the Los Angeles County Superior Court, Valerie Skeba, Juvenile Court Referee. Affirmed.

Lori Siegel, under appointment by the Court of Appeal, for Defendant and Appellant M.M.

Roni Keller for Respondent children Esmeralda M. and Jesus G.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel and Timothy M. O'Crowley, Senior Deputy County Counsel, for Plaintiff and Respondent Los Angeles County Department of Children and Family Services.

M.M. (Father) appeals from the order declaring his children, Esmeralda M. (born January 2000) and Jesus G. (born March 2007), dependents of the juvenile court and placing them in the home of their mother, Maria G., under the supervision of the Los Angeles County Department of Children and Family Services (Department). Father contends the evidence of domestic violence and marijuana and alcohol abuse is insufficient to support the court's jurisdiction findings. He also contends there is insufficient evidence to support the juvenile court's disposition order removing the children from his custody and placing them with Maria G. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Detention of the Children*

The Department initiated dependency proceedings on behalf of Esmeralda M. and Jesus G. on January 16, 2009 pursuant to Welfare and Institutions Code section 300, subdivision (b),[1] alleging that Father and Maria G. had a history of engaging in domestic violence in the presence of their children and Maria G. had failed to protect the children from the violence. In support of the petition the Department reported that in December 2008 Father had struck Maria G. in the face and body with a closed fist, choked her and slammed her against the wall during an argument; the children were home during the incident.[2] Father had also hit Maria G. on previous occasions in the children's presence or while the children were at home. Despite this history of domestic violence, Maria G. continued to reside with Father and allowed him unmonitored access to the children.

At the detention hearing on January 16, 2009 the juvenile court found the Department had made a prima facie case that Esmeralda M. and Jesus G. were persons

---

1 Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 On January 6, 2009, in connection with the December 2008 incident of domestic violence, Father pleaded no contest to a misdemeanor charge of domestic battery (Pen. Code, § 242, subd. (e)(1)). He was sentenced to 30 days in jail and received three years' probation. He was also ordered, among other things, to obtain domestic violence counseling as a condition of probation.

described by section 300, subdivision (b). Fearing for the children's immediate safety, the court rejected the Department's recommendation to place the children with Maria G., who was living at the time with the children's paternal grandmother, and instead ordered the children removed from both parents and temporarily detained in shelter care until further order of the court.

On February 17, 2009 the Department amended the dependency petition to allege as an additional ground for jurisdiction that Father had a history of abusing alcohol and marijuana, which made him incapable of providing regular care for the children and put them at risk of physical and emotional harm. (§ 300, subd. (b).)

2. *The Jurisdiction/Disposition Hearing*

With respect to the domestic violence allegations, Father and Maria G. submitted the determination of jurisdiction on the information provided in the Department's report. The marijuana and alcohol abuse allegations, however, were disputed by Father; and the juvenile court set that issue for a contested hearing.

According to the evidence presented during the April 28, 2009 contested jurisdiction and disposition hearing, Esmeralda M. was born in 2000 in Mexico. She has cerebral palsy, is nonambulatory and suffers from seizure disorder. In 2003 Maria G. and Father agreed that Esmeralda M. would live with Father and his mother, Dulce M., in the United States in an effort to provide Esmeralda M. with the best medical services for her disabilities.

In 2007 Maria G. moved to the United States to live with Father and his mother to help care for Esmeralda M. Father explained it was Dulce M.'s idea that Maria G. live with them, and he only agreed to it because Dulce M. had become ill and was no longer able to assist him in caring for Esmeralda M.

Soon after Maria G. arrived, she became pregnant with Jesus G. Father and Maria G. quarreled frequently; and, on at least three occasions, Father became violent. According to the Department's jurisdiction/disposition report, the most recent attack took place after a quarrel in December 2008, when Father hit Maria G. in the face, choked her and slammed her against a wall, causing bruises.

Maria G. testified Father drove Jesus G. in the car while under the influence of alcohol and she felt powerless to stop him because she was scared he would become violent. She also testified he smoked marijuana in the garage while the children were in the house, and people inside the house could smell the smoke. Father denied driving his children in the car while under the influence of drugs or alcohol. The social worker testified it was his recommendation that both children be placed in shelter care because Maria G. had not completed six months of domestic violence counseling, a benchmark he felt was necessary before the children could be safely placed in her care.

3. *The Juvenile Court's Ruling on Jurisdiction and Its Disposition Order*

The juvenile court sustained each of the allegations in the section 300 petition and declared each of the children dependent children of the court. The court ordered Father and Maria G. to complete domestic violence counseling and ordered Father to submit to random drug and alcohol testing. The court rejected the social worker's recommendation for placement of both children in shelter care, calling the six-month benchmark "formulaic" and "without evidentiary support," and placed both children in the home of Maria G. under the supervision of the Department. Family reunification services were ordered for Father. Pursuant to Maria G.'s request, the court transferred the matter to San Diego where Maria G. currently resides.

DISCUSSION

1. *Standard of Review*

Father contends the evidence is insufficient to support both the juvenile court's jurisdiction findings and its disposition order. When the sufficiency of the evidence to support a juvenile court's finding or order is challenged on appeal, the reviewing court must determine if there is substantial evidence, contradicted or uncontradicted, that supports it. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393; *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.) Under this standard of review we examine the whole record in a light most favorable to the findings and conclusions of the juvenile court and defer to that court on all issues of credibility. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734.) We must resolve all conflicts in support of the determination

and indulge all legitimate inferences to uphold the court's order. Additionally, we may not substitute our deductions for those of the trier of fact. (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547; *In re John V.* (1992) 5 Cal.App.4th 1201, 1212; *In re Eric B.* (1987) 189 Cal.App.3d 996, 1004-1005.)

2. *Substantial Evidence Supports the Juvenile Court's Jurisdiction Findings*

a. *Domestic violence*

Evidence of a child's exposure to domestic violence in the home supports the exercise of dependency jurisdiction. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194; see also *In re S.O.* (2002) 103 Cal.App.4th 453, 460-461 [exposure to spousal abuse in home puts children at substantial risk of harm]; *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562 ["'[b]oth common sense and expert opinion' . . . 'indicate spousal abuse is detrimental to children'"].)

Father acknowledges the evidence in the record supports a finding he engaged in acts of domestic violence directed to Maria G., but contends there was no evidence that any domestic abuse occurred in the presence of the children.[3] Contrary to Father's suggestion, the children need not actually witness the violence in order to be harmed by it. (See *In re Heather A., supra,* 52 Cal.App.4th at p. 194 [children who are in the home when violence occurs are at risk even if they do not directly witness it, "since, for example, they could wander into the room where it [is] occurring and be accidentally hit by a thrown object, by a fist, arm foot or leg, or by [a parent] falling against them"].) Moreover, the social worker's report prepared for the jurisdiction hearing is replete with instances of domestic violence that occurred in the children's presence, as well as while the children were elsewhere in the home.

According to the report on which Father submitted this issue, in 2006 Father became angry and slapped Maria G. hard in front of Esmeralda M., causing Esmeralda M. to cry. On another occasion, in 2008, Father became angry and hit

---

3 As discussed, Father submitted the jurisdictional determination on the information provided to the court by the Department. (See Cal. Rule of Court, rule 5.682(e).)

Maria G. on the side of her leg in front of Jesus G., causing him to cry. In December 2008 Father hit Maria G. in the face, put his hands on her neck and choked her and shoved her hard against the wall, causing bruises. Jesus G. was in the home at the time and, according to Yvonne M., Father's sister, had witnessed at least part of the altercation.

Notwithstanding this evidence of extensive domestic violence between Father and Maria G., Father contends dependency jurisdiction was not properly exercised because there was no evidence the abuse would continue in the future: He and Maria G. had separated, and Maria G. was currently residing in San Diego. (See *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824 ["While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm. [Citations & fn. omitted.] Thus, the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; '[t]here must be some reason to believe the acts may continue in the future.'"]; accord, *In re Alysha S.* (1996) 51 Cal.App.4th 393, 399.)

Significantly, this is not a case in which the incidents of domestic violence are remote in time. Father's most recent, and most serious, violent altercation with Maria G. occurred in December 2008, four months prior to the jurisdiction hearing. Although Father had begun attending domestic violence counseling by the time of the jurisdiction hearing, nothing in the record indicates his brief participation in those sessions had eliminated or in any way ameliorated the substantial risk his aggressive behavior posed to their children. (See *In re S.O., supra,* 103 Cal.App.4th at p. 461 ["'past conduct may be probative of current conditions'" if there is a reason to believe the conduct will continue, especially when parent has not adequately addressed factors that led to his or her failure to protect children].) Accordingly, substantial evidence supports the trial court's jurisdiction findings on the domestic violence allegations.

b. *Father's abuse of alcohol and marijuana*

Father also challenges the court's jurisdiction findings relating to his alcohol and marijuana use, contending there was no evidence his abuse of those substances presented

a danger to the children. We need not reach this question in light of the ample evidence supporting the domestic violence allegations. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 ["When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence."].) Nonetheless, we address it to eliminate any doubt as to the significance of this aspect of the court's findings and order.

Contrary to Father's contention, the evidence of alcohol and marijuana abuse was independently sufficient to support the court's jurisdiction findings. Maria G. testified Father drank six to 12 cans of beer almost every day and would drive with Jesus G. in the car while under the influence of alcohol. Father also smoked marijuana several times a week (to relieve back pain, according to his statements). Father told the social worker he had cared for his children on one or two occasions while under the influence of marijuana, but insisted he was "clean now." This evidence was more than sufficient to support the court's jurisdiction findings. (See *In re Samkirtana S.* (1990) 222 Cal.App.3d 1475, 1489 [parent's alcohol abuse posed risk of harm to child]; *In re Alexis E., supra,* 171 Cal.App.4th at p. 452 [parent's marijuana use posed risk to child].)

3. *Substantial Evidence Supports the Juvenile Court's Disposition Order Removing the Children from Father's Custody*

Section 361, subdivision (c)(1), permits removal of a child from his or her parent's custody only if the juvenile court finds by clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being" of the child if the child is returned home and "there are no reasonable means by which the [child]'s physical health can be protected without removing" the child from his or her parent's custody." "[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the

jurisdictional phase if the minor is to be removed from his or her home." (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 694.) The burden of proof at the jurisdictional phase is preponderance of the evidence; the burden of proof at disposition is clear and convincing evidence. (*Ibid.*; see also § 355, subd. (a) [jurisdiction findings by preponderance of evidence]; § 361, subd. (c) [disposition findings by clear and convincing evidence].) This heightened burden of proof at disposition balances the constitutionally protected rights of parents to the care, custody and management of their children with the need to protect the child when that care, custody and management threatens the child's safety and well-being. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753 [102 S.Ct. 1388, 71 L.Ed.2d 599]; *In re Angelia P.* (1981) 28 Cal.3d 908, 917.)

Father contends, even if there was substantial evidence to support jurisdiction, the evidence was insufficient to satisfy the higher "clear and convincing" burden required to support the court's disposition order removing Esmeralda M. and Jesus G. from his custody. By the time of the disposition hearing, Father asserts he had participated in eight of 52 court-ordered domestic violence counseling and anger management classes and had gained a new-found appreciation of the pain his aggressive behavior had caused Maria G. Moreover, according to Father, there was no longer any risk to the children by being in his care: He had not been violent with his children or with any person other than Maria G., and any risk to his children posed by his toxic relationship with Maria G. had disappeared once Maria G. moved out of the home.

Indulging, as we must, all reasonable inferences to support the juvenile court's findings (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545), the evidence plainly supports the juvenile court's disposition order, even as we bear in mind the heightened burden of proof of clear and convincing evidence for removal of a child under section 361. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 762; *In re Joanna Y.* (1992) 8 Cal.App.4th 433, 439; see also *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881 ["The 'clear and convincing' standard . . . is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] '"The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and

convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.""""].)

The evidence before the court was that Father had engaged in violent and abusive behavior either in the immediate presence of his children or while they were in the home. Apart from Father's assertions to the contrary, there was simply no evidence that the brief counseling he had received was, at this stage of the proceedings, sufficient to protect the children from the substantial risk created by his violent behavior. The juvenile court also expressed doubt about Father's credibility, citing his missed drug test and questioning his ability to refrain from using alcohol and marijuana while his children were in his care.[4] Father, who cites evidence of the close relationship he and his children share, may disagree with the court's credibility determination and its decision to remove the children from his custody pending further review once Father receives more counseling and submits to more drug testing, but we are not free to reweigh the evidence or substitute our evaluation of the risk he poses to the children for that of the juvenile court.

Finally, Father challenges the portion of the disposition order placing both children with Maria G. under the supervision of the Department, contending she is unable to care for the children's needs, particularly the special needs of Esmeralda M. At the threshold, that contention, as it pertains to Esmeralda M.'s placement, is now moot. On October 28, 2009 a supplemental petition was filed in the San Diego County juvenile court under section 387 that resulted in an order removing Esmeralda M. from Maria G.'s

---

4 The court stated, "I think it's very interesting that Father had such severe pain that he had to smoke marijuana for it; yet he could lift around this other child—this child who has all of these various disabilities with no problem. Either he was under the influence at the time he was caring for the child, or I think he's not being truthful about his reasons for smoking marijuana. I'll also note that this case has been in the system since January. And yet he has only managed one test and missed one. So I think there's a lot more going on here than he's telling us or grandma is telling us."

care and placing her in a licensed group home.[5] Accordingly, the propriety of the placement of Esmeralda M. with Maria G. is no longer a live issue. (See, e.g., *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315 ["[w]hen no effective relief can be granted, an appeal is moot"]; accord, *In re Dani R.* (2001) 89 Cal.App.4th 402, 404 [action originally based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent events]; *Jonathan Neil & Associates, Inc. v. Jones* (2006) 138 Cal.App.4th 1481, 1491 [intervening order setting aside judgment prior to consideration of appeal renders appeal from vacated judgment moot].)

As to the placement of Jesus G. in Maria G.'s care under the supervision of the Department, substantial evidence supports the juvenile court's order. Following the most serious incident of domestic violence—the December 2008 attack that led to the initiation of dependency proceedings in January 2009—Maria G.'s actions were, as the court described, quite reasonable. After the children were detained, she moved into a confidential domestic violence shelter where she requested and received counseling and completed parenting classes. When her residency at the shelter concluded, Maria G. moved to San Diego, where she had family support to assist her. There was no evidence to suggest that placement of Jesus G. with his mother posed any risk to Jesus G., nor, significantly, does Father cite any such evidence in his appellate brief, which is directed exclusively to Maria G.'s ability to care for Esmeralda M.'s special needs.

---

5 We take judicial notice of the San Diego County juvenile court's October 29, 2009 and January 7, 2010 minute orders pursuant to Evidence Code sections 452, subdivision (d), and 459, subdivision (a). Pursuant to our request, each of the parties, including counsel for Esmeralda M. and Jesus G., has addressed in letter briefs filed with this court the effect of the San Diego County juvenile court's orders on this appeal.

DISPOSITION

The juvenile court's jurisdiction findings and disposition order are affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.